U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 January 2007

BALCA Case No.: 2005-INA-00074
ETA Case No.: 2003-NY-02500182

In the Matter of:

DIAMOND CAR AND LIMOUSINE SERVICE,
Employer,

on behalf of

YASER BADER HAJ,
Alien.

Appearance: Jed David Philwin, Esquire
New York, New York
For the Employer

Certifying Officer: Dolores DeHaaan
New York, New York

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM: This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification in the above-captioned matter. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1]

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We

STATEMENT OF THE CASE

On April 30, 2001, the Employer, Diamond Car & Limousine Service, filed an application for labor certification to enable the Alien, Yaser Bader Haj, to fill the position of Dispatch Manager. (AF 121). The Employer required two years of experience in the job offered. The Employer requested Reduction in Recruitment ("RIR") processing. (AF 133).

On April 5, 2004, the CO issued a Notice of Findings ("NOF") denying the RIR and proposing to deny labor certification. (AF 116). Therein, the CO stated that the job offer was classified and coded as "Supervisor, Cab," and noted that the Employer had a second application for labor certification pending on behalf of another alien to perform the same job under the same terms and conditions of employment. Neither application indicated that the Aliens were currently employed by the Employer and therefore, it appeared to the CO that the Employer presently employed someone else for the position. The CO did not understand why the services of two additional workers were required to perform the job and questioned whether a *bona fide* job offer existed.

The Employer was directed to provide rebuttal demonstrating that the job offered was *bona fide* and that permanent, full-time work could be guaranteed for the position. The CO directed the Employer to submit Federal Income Tax returns for the past three years and proof that the job existed prior to the Alien being sponsored. The CO directed that if the job was not pre-existing, the Employer should provide evidence that a major change in the Employer's business operations had caused the job to be created prior to the filing of the application.

The Employer submitted rebuttal dated July 18, 2004. (AF 43). Therein, the Employer's president stated that it was open 24 hours per day, and that it petitioned for two persons for the same position because their on-duty schedule covered different time frames. The morning schedule was from 9 a.m. to 5 p.m. and the evening schedule was from 5 p.m. to 2 a.m. The Employer contended that it had the funds to pay the offered salary and that in the past outside contractors had been used, which was not as financially prudent as hiring dispatch managers.

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base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

According to the Employer, the employee would supervise ten drivers. The Employer submitted Corporation Income Tax Returns for the years 2000 through 2002. It also submitted a letter from a Certified Public Accountant which showed that between 2000 and 2002, the Employer used subcontracting services totaling between approximately $427,000 and $533,000 each year.

A Final Determination denying the application was issued on August 5, 2004. (AF 41). The CO noted that the Employer had amended the daily work schedule in the second application to show employment from 5 p.m. to 2 a.m.; however, the rebuttal did not address who would work the shift from 2 a.m. to 9 a.m. While the Employer submitted income tax returns, the CO pointed out that none of the documents reflected any deductions for salaries, wages or labor costs. Thus, there was no evidence that there had ever been an employer/employee relationship between the Employer and any of the individuals who perform the contract services, including drivers. The application, therefore, was denied.

The Employer submitted a request for review or in the alternative, a request for reconsideration. (AF 2). The CO denied the Employer's Request for Reconsideration and forwarded the application to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 1). The Board docketed the case on December 13, 2004.

DISCUSSION

The requirement of a *bona fide* job opportunity arises out of 20 C.F.R. § 656.20(c)(8), which states that an employer must clearly show that the "job opportunity has been and is clearly open to any qualified U.S. worker." An employer bears the burden of proving that a *bona fide* job opportunity exists and is open to U.S. workers. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc). "When applying the totality of the circumstances test, it may be helpful to think first in terms of the factual circumstances surrounding the application, and second, what those circumstances have to say about the *bona fides* of the position." *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc). Where the factual circumstances reveal the employer's

intention to hire the Alien as its only employee, with all other workers considered to be subcontractors, the question arises of whether the position is possibly being used to promote immigration rather *bona fide* employment. *Eastlake Pools & Landscape Inc.*, 2003-INA-276 and 277 (Sept. 13, 2004). Thus, a CO reasonably may inquire into the *bona fides* of a job offer where the employer is sponsoring a permanent alien labor certification application for a position that had previously been filed by an independent contractor. *See Al-Or International, Ltd.*, 1994-INA-427 (Jan. 17, 1996).

The instant case involves a limousine company that wants to create full-time jobs for dispatch managers, while apparently retaining its prior practice of treating all other labor as "independent contractors." Given this circumstance, the CO reasonably inquired into whether the Employer would be providing *bona fide* employment open to any qualified U.S. worker.[2] The issue is, therefore, whether the Employer has credibly established that it will now convert the Dispatch Manager positions[3] to *bona fide*, full-time employment.

We agree with the CO that the Employer did not provide convincing documentation to explain why a change in its business model or operations required it to change the Dispatch Manager positions from contract labor to a *bona fide* employer-employee relationship. Indeed, as the CO noted, while the Employer claimed that the position is needed on a 24 hours per day basis, it did not explain who will cover the eight-hour shift beginning at 2 a.m. and ending at 9 a.m. Thus, it is not clear if the Employer is going to use two full-time employees for two shifts and a contract laborer for the third shift.

The rationale presented by the Employer on rebuttal for converting the Dispatch Manager positions into paid employee positions was that taxi business was on the upswing in New York, and that it determined that it would now be prudent to hire a dispatch manager rather than to

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[2] We note that the job description for the Dispatch Manager contained in the ETA 750A refers to duties that include hiring, training, and discharging "employees." (AF 121). This reference to employees suggests that the Employer treats its workers as employees, but utilizes a fiction that they are "independent contractors" for tax purposes and to avoid other legal obligations associated with employment.

[3] "Dispatch Manager" is the Employer's job title. We agree with the CO that a more precise job title would be "Manager, Cab," because the duties described in the ETA 750A indicate that the incumbent would be operationally responsible for much more than just dispatch. (see AF 121).

continue to use a contract worker. Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting evidence is insufficient to carry the Employer's burden of proof. *See Gencorp,* 1987-INA-659 (Jan. 13, 1988) (en banc). The Employer's assertion about an upswing in business is supported only by a press release from a website named www.nycvisit.com, which only states the rather unremarkable fact that tourism increases in New York during the summer. (AF 64-65). Even if the Employer had shown an unprecedented upswing in taxi business had occurred in New York, that fact standing alone does not explain why the Employer would suddenly change its business model and start using "on the books" Dispatch Managers. The Employer's argument leaves open the obvious question of why it would only convert the Dispatch Manager positions.

In its motion for reconsideration, the Employer argued that

> It does not pay to hire outside contractors for [the dispatch manager] position as the outside contractors are demanding more and more money. We have no control as per their demand for payment. There is no set prevailing wage for an outside contractor. In fact, when we filed this case we put out the word to our drivers and others in the industry that we are looking for a Supervisor, Cab. Some people came back to us by referral and they were demanding double the prevailing wage as they were outside contractors. As such, we need to have the right to hire someone so we can control our expenses and continue to be a profitable concern.

(AF 2). Although this statement more directly addresses the issue of why the Employer chose to change its business model than did the rebuttal, it is well settled that evidence and argument submitted after the issuance of the Final Determination cannot be considered on appeal pursuant to 20 C.F.R. §656.27(c). *See, e.g., Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (en banc). Even if this statement was properly before the Board for consideration, it is still a bare assertion, lacking in any detail or independent support, and therefore is insufficient to carry the Employer's burden of showing that the newly transformed Dispatch Manager position constitutes a *bona fide* job opportunity.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR,

such a denial should result in the remand of the application to the local job service for regular processing. A remand, however, is not required where the application is so fundamentally flawed that a remand would be pointless, such as here, where the Employer failed to document that a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.